

**THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

JAISH MARKOS, individually on behalf of
himself and all others similarly situated,

Plaintiff,

v.

RUSSELL BRANDS, LLC,

Defendant.

Case No.: 7:16-cv-04632 (CS)

**DECLARATION OF MICHAEL R. MCDONALD
IN SUPPORT OF
DEFENDANT RUSSELL BRANDS, LLC'S
MOTIONS TO EXCLUDE EXPERT TESTIMONY
AND OPPOSITION TO CLASS CERTIFICATION**

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*Attorneys for Defendant
Russell Brands, LLC*

I, **MICHAEL R. MCDONALD**, an attorney duly admitted *pro hac vice* to practice before the Bar of this Court, hereby declare as follows:

1. I am an attorney with Gibbons P.C., attorneys for Defendant Russell Brands, LLC (“Russell” or “Spalding”) in the above-captioned matter. I respectfully submit this Declaration in support of Defendant Russell Brands, LLC’s Motions to Exclude Expert Testimony (Daubert Motion One: Jeffrey McFadden/i3 Engineering Sciences; Daubert Motion Two: Stuart Brown, Ph.D./Veryst Engineering Services; Daubert Motion Three: Colin Weir) and Brief in Opposition to Class Certification.

2. Annexed hereto as Exhibit A is a true and correct copy of the report of Plaintiff’s expert, Jeffrey McFadden, i3 Engineering Sciences, served on December 1, 2017.

3. Annexed hereto as Exhibit B is a true and correct copy of McFadden Supplemental Production 00001-00167. This set of documents was identified by Mr. McFadden (Tr. 16:7-14) as containing the appendices referenced on page 30 of his report (see Exhibit A).

4. Annexed hereto as Exhibit C is a true and correct PDF printout/representation of the “Sample log data” produced by Plaintiff’s counsel as the datasheet underpinning Mr. McFadden’s report. This PDF printout copy was identified by Mr. McFadden as representing the original spreadsheet data (Tr. 14:21-15:21). Spalding is also providing the Court with the original excel spreadsheet—as produced—via accompanying CD.

5. Annexed hereto as Exhibit D is a true and correct copy of the deposition transcript of Plaintiff’s expert Jeffrey McFadden, i3 Engineering Services, dated January 10, 2018. Spalding is also providing the Court with a searchable PDF copy of the transcript via accompanying CD.

6. Annexed hereto as Exhibit E is a true and correct copy of the confidential expert

report of Russell Brands, LLC's expert, Daniel D. Frey, Ph.D., served on January 12, 2018.

7. Annexed hereto as Exhibit F is a true and correct copy of the confidential expert report of Russell Brands, LLC's expert, Donald A. Sandusky, Ph.D., served on January 12, 2018. Dr. Sandusky's report was produced with eleven exhibits, including four (4) excel spreadsheets (Exs. H, I, J, and K to Sandusky Rep.). PDF samples and/or cover sheets of each of these excel exhibits are included with the PDF file representing Dr. Sandusky's report. Spalding is also providing the Court with the original excel spreadsheets—as produced—via accompanying CD.

8. Annexed hereto as Exhibit G is a true and correct copy of a letter from The Sultz Law Group P.C. to Russell Brands, LLC, enclosing a copy of the Draft Class Action Complaint, dated February 5, 2016.

9. Annexed hereto as Exhibit H is a true and correct copy of the 2015 Spalding Retail Price List, bates-stamped Russell_05162-05168.

10. Annexed hereto as Exhibit I is a true and correct copy of the 2010 Spalding Retail Catalog, bates-stamped Russell_00364-00407.

11. Annexed hereto as Exhibit J is a true and correct representation of the “Molten USA – Basketball” website (<https://moltenusa.com/shop-all/basketball>, last visited June 15, 2018). Full webpage content is printed to this PDF/printout, although some formatting features were lost.

12. Annexed hereto as Exhibit K is a true and correct representation of the “Basketball – Competition – Molten USA” website (<https://moltenusa.com/shop-all/basketball/competition>, last visited June 15, 2018). Full webpage content is printed to this PDF/printout, although some formatting features were lost.

13. Annexed hereto as Exhibit L is a true and correct representation of a “Wayback

Machine” archived website for “Molten Basketball | BMG Basketball Series – FIBA Approved | Molten USA” (<http://moltenusa.com:80/molten-basketball/product/competition/detail/bgm7.html>, archived website dated Mar. 22, 2015; accessed Nov. 29, 2017). This webpage was shown to Plaintiff’s expert, Jeffrey McFadden at his deposition as marked as McFadden-5.

14. Annexed hereto as Exhibit M is a true and correct copy of a document (Amazon receipt) produced by Plaintiff’s counsel in response to Spalding’s request for invoices reflecting basketball purchases by Plaintiff’s expert, Jeffrey McFadden, i3 Engineering Sciences.

15. Annexed hereto as Exhibit N is a true and correct copy of a document (Spalding receipt) produced by Plaintiff’s counsel in response to Spalding’s request for invoices reflecting basketball purchases by Plaintiff’s expert, Jeffrey McFadden, i3 Engineering Sciences.

16. Annexed hereto as Exhibit O is a true and correct copy of the internal Spalding “Product Specifications” for Neverflat[®] Competitive Outdoor Size 7 Basketball (Item No./Model: 63803[9]), bates-stamped Russell_00746-749.

17. Annexed hereto as Exhibit P is a true and correct copy of the internal Spalding “Production Specifications” for Neverflat[®] Indoor/Outdoor Size 7 Composite Basketball (Item No./Model: 74764[9]), bates-stamped Russell_00730-00733.

18. Annexed hereto as Exhibit Q is a true and correct copy of the internal Spalding “Production Specifications” for NBA Neverflat[®] Hexagrip SGT (SoftGrip Technology) Red/White/Blue Size 7 Rubber Basketball (Item No./Model: 71091[8]), bates-stamped Russell_00709-00712.

19. Annexed hereto as Exhibit R is a true and correct copy of the report of Plaintiff’s expert, Stuart B. Brown, Ph.D., Veryst Engineering Services, served on December 1, 2017.

20. Annexed hereto as Exhibit S is a true and correct PDF printout/representation of the “V-1147 Test Log” produced by Plaintiff’s counsel as the datasheet underpinning Dr. Brown’s report. This PDF printout (also marked as Brown-2) was identified by Dr. Brown as representing the original spreadsheet (Tr. 20:6-24). Spalding is also providing the Court with the original excel spreadsheet—as produced—via accompanying CD.

21. Annexed hereto as Exhibit T is a true and correct copy of the deposition transcript of Plaintiff’s expert, Stuart B. Brown, representative of Veryst Engineering Services, dated January 25, 2018. Spalding is also providing the Court with a searchable PDF copy of the transcript via accompanying CD.

22. Annexed hereto as Exhibit U is a true and correct copy of the 2016 Spalding Retail Catalog, bates-stamped Russell_00648-00699.

23. Annexed hereto as Exhibit V is a true and correct printout/representation of the “Spalding Product Development Test Request” spreadsheet, bates-stamped Russell_00268. Spalding is also providing the Court with the original excel spreadsheet—as produced—via accompanying CD.

24. Annexed hereto as Exhibit W is a true and correct copy of the deposition transcript of Lynn Smith, employee and representative of Russell Brands LLC, dated September 13, 2017. Spalding is also providing the Court with a searchable PDF copy of the transcript via accompanying CD.

25. Annexed hereto as Exhibit X is a true and correct printout/representation of the [REDACTED] (last test date Jan. 5, 2017), bates-stamped Russell_00362. Spalding is also providing the Court with the original excel spreadsheet—as produced—via accompanying CD.

26. Annexed hereto as Exhibit Y is a true and correct printout/representation of the [REDACTED] (last test date Sept. 5, 2017), bates-stamped Russell_15810. Spalding is also providing the Court with the original excel spreadsheet—as produced—via accompanying CD.

27. Annexed hereto as Exhibit Z is a true and correct copy of Plaintiff's expert report of Colin Weir, served on December 1, 2017.

28. Annexed hereto as Exhibit AA is a true and correct copy of the deposition transcript of Plaintiff's expert, Colin B. Weir, dated January 4, 2018. Spalding is also providing the Court with a searchable PDF copy of the transcript via accompanying CD.

29. Annexed hereto as Exhibit BB is a true and correct copy of the confidential expert report of Russell Brands, LLC's expert, Denise Neumann-Martin, Ph.D., served on January 12, 2018.

30. Annexed hereto as Exhibit CC is a true and correct printout/representation of a portion of the [REDACTED]

[REDACTED] Spalding is also providing the Court with the *full* original excel spreadsheet—as produced—via accompanying CD.

31. Annexed hereto as Exhibit DD is a true and correct copy of Russell's Response to Plaintiff's First Set of Requests for Production of Documents, dated January 6, 2017.

32. Annexed hereto as Exhibit EE is a true and correct copy of the confidential expert report of Russell Brands, LLC's expert, Joel Howard Steckel, Ph.D., served on January 12, 2018. All appendices to Dr. Steckel's report are included with this PDF printout/document; however, three of Dr. Steckel's survey appendices (D-5, D-6, and E-5) were originally produced in Excel

format. Spalding is also providing the Court with these original excel spreadsheets—as produced—via accompanying CD.

33. Annexed hereto as Exhibit FF is a true and correct copy of the Reference Guide on Estimation of Economic Damages by Mark A. Allen (pages 425-502 to *Reference Manual on Scientific Evidence*, FEDERAL JUDICIAL CENTER, NATIONAL RESEARCH COUNCIL (3d Ed. 2011)).

34. Annexed hereto as Exhibit GG is a true and correct copy of the deposition transcript of Brian Collins, employee and representative of Russell Brands LLC, dated August 31, 2017. Spalding is also providing the Court with a searchable PDF copy of the transcript via accompanying CD.

35. Annexed hereto as Exhibit HH is a true and correct printout/representation of the first sheet of the [REDACTED]
[REDACTED]. Spalding is also providing the Court with the *full* original excel spreadsheet—as produced—via accompanying CD.

36. Annexed hereto as Exhibit II is a true and correct copy of a PDF representation of the Neverflat[®] subpage of the shop.spalding.com website (produced in native form), bates-stamped Russell_00274. This is the same document that was included as Ex. S to the Declaration of Michael R. McDonald in Support of Russell's Motion for Summary Judgment.

37. Annexed hereto as Exhibit JJ is a true and correct printout/representation of an excel spreadsheet containing Neverflat[®] 2011-2016 return data, bates-stamped Russell_00754. Spalding is also providing the Court with the original excel spreadsheet—as produced—via accompanying CD.

38. Annexed hereto as Exhibit KK is a true and correct printout/representation of an excel spreadsheet containing Neverflat[®] 2011-2016 return data, bates-stamped Russell_00755.

Spalding is also providing the Court with the original excel spreadsheet—as produced—via accompanying CD.

39. Annexed hereto as Exhibit LL is a true and correct copy of the deposition transcript of Angie Doig, employee and representative of Russell Brands LLC, dated September 14, 2017. Spalding is also providing the Court with a searchable PDF copy of the transcript via accompanying CD.

40. Annexed hereto as Exhibit MM is a true and correct copy of an email sent to SpaldingCustomerService@fruit.com on March 25, 2015, bates-stamped Russell_02158.

41. Annexed hereto as Exhibit NN is a true and correct copy of Primo Innovations presentation titled, “Neverflat™ Technologies for Inflated Basketballs”, dated May 9, 2006 and bates-stamped Russell_00058-00145.

42. Annexed hereto as Exhibit OO is a true and correct printout/representation of an excel spreadsheet titled, [REDACTED]
[REDACTED] Spalding is also providing the Court with the original excel spreadsheet—as produced—via accompanying CD.

43. Annexed hereto as Exhibit PP is a true and correct printout/representation of an excel spreadsheet titled, [REDACTED] Spalding is also providing the Court with the original excel spreadsheet—as produced—via accompanying CD.

44. Annexed hereto as Exhibit QQ is a true and correct copy of a Letter from Jose E. Serrano, Chairman of the New York State Assembly Committee on Consumer Affairs and Protection regarding Section 349 of the New York General Business Law, dated May 29, 1980.

45. Annexed hereto as Exhibit RR is a true and correct copy of a Memorandum in Support of Legislation, dated January 6, 2017, sponsored by Assembly Members Strelzin,

serrano, Grannis, and Lafayette regarding Section 350 of the New York General Business Law.

46. Annexed hereto as Exhibit SS is a true and correct copy the transcript of conference before Honorable Vincent L. Briccetti, U.S.D.J., In re: Scotts EZ Seed Litigation, 12-cv-4727 (Dkt. No. 238-18), dated June 10, 2016. Spalding is also providing the Court with a searchable PDF copy of the transcript via accompanying CD.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

GIBBONS P.C.

Dated: July 20, 2018

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